Decision of the European Ombudsman closing his inquiry into complaint 2914/2009/DK against the European Medicines Agency

Decision

Case 2914/2009/DK - Opened on 18/12/2009 - Decision on 14/03/2012

In July 2009, the complainant, a French citizen, requested that the European Medicines Agency give him public access to two internal audit reports, one on access to information and another on selected administrative procedures relating to scientific evaluation of medicines. When the Agency refused access to the reports, the complainant turned to the European Ombudsman.

The Ombudsman found that the Agency wrongly refused public access to the reports when it argued that public access would undermine the protection of the purpose of inspections, investigations, and audits. Moreover, the Ombudsman found that the audit exercises in question had already been concluded and that there was thus no risk that the auditing exercise would be undermined by the public disclosure of the reports. The Ombudsman therefore made a proposal for a friendly solution in which he asked the Agency to reconsider its refusal to grant access to the two audit reports.

In its reply to the Ombudsman's friendly solution proposal, the Agency agreed to reconsider its refusal to make the reports public. In December 2011, the Agency provided the complainant with the two audit reports, as well as with an accompanying note on the implementation of the recommendations made in the reports.

When closing his inquiry with a finding that a friendly solution had been achieved, the Ombudsman underlined the notable progress that the Agency has recently made in rendering its work more transparent. He added that such significant improvements serve to ensure that citizens will have greater trust in the Agency, thus increasing its legitimacy and effectiveness in carrying out its important public health tasks.

The background to the complaint

1. The complaint concerned a refusal to grant a request for public access to documents. On 24 July 2009, the complainant, a French citizen, applied to the European Medicines Agency (the 'Agency') for public access to documents in accordance with Regulation 1049/2001 [1]. The complainant requested access to the reports of two internal audits carried out in 2008,
that is, (i) the internal audit report on Access to information (Reference number A08006), drafted by the Internal Audit Sector of the Agency, and (ii) the final audit report on selected administrative procedures supporting the provision of scientific evaluation for human medicines in the European Medicines Agency (IAS.A.2008.-W-EMEA-001), drafted by the Internal Audit Service of the European Commission.

2. On 4 September 2009, the Agency refused access on the basis of Article 4(2) of Regulation 1049/2001, which states that a request for public access can be denied if disclosure of the requested document undermines the protection of the purpose of inspections, investigations and audits. The Agency informed the complainant that he could submit a confirmatory application to challenge its decision.

3. On 9 September 2009, the complainant submitted a confirmatory application.

4. On 25 September 2009, the Agency confirmed its previous decision that, on the basis of the protection of the purpose of inspections, investigations and audits, access could not be granted to the requested documents. It pointed out that the audit in question had not yet been finalised.

5. On 30 September 2009, the complainant turned to the Ombudsman to complain about the Agency's rejection of his application for access to documents. The complaint was registered under reference 2476/2009/DK.

6. The Ombudsman took the view that the Agency's reasoning was very brief and did not allow the complainant to understand why his application had been rejected. Therefore, on 6 November 2009, the Ombudsman requested the Agency to provide the complainant with a detailed reply explaining when the audit in question was likely to be finalised and when the complainant could renew his request for access to the documents concerned.

7. On 20 November 2009, the Agency forwarded to the Ombudsman a copy of the reply it had sent to the complainant that same day. In this reply, the Agency explained that one of the reports concerned by the Ombudsman's request was written by the Commission, and thus had to be classified as a third party document. Therefore, and in accordance with Article 4(4) of Regulation 1049/2001 [2], the Agency consulted the Commission to determine if the exception provided for in Article 4(2) of the Regulation 1049/2001 [3] was applicable. It also explained that the Commission confirmed that disclosure of the requested documents would undermine the protection of the purpose of the audits in question "since the implementation of the subsequent action plan had not yet been finalized." The Agency therefore maintained its confirmatory decision to refuse access to the requested documents.

8. On 9 December 2009, in view of this more detailed reply, the Ombudsman closed complaint 2476/2009/DK as settled by the institution.

9. On 24 November 2009, the complainant wrote [4] to the Ombudsman again. He commented on the Agency's above reply because he was not satisfied with it. The complainant's letter was registered as a new complaint.
The subject matter of the inquiry

10. The Ombudsman opened an inquiry into the following allegation and claim.

Allegation:

The Agency failed properly to deal with the complainant's request for access to documents.

Claim:

The Agency should grant the complainant full access to the documents requested.

The inquiry

11. On 18 December 2009, the Ombudsman asked the Agency to submit an opinion on the complaint. The Agency submitted its opinion on 9 April 2010. The opinion was forwarded to the complainant, who submitted his observations on 30 May 2010.

12. On 9 September 2011, the Ombudsman made a proposal for a friendly solution. On 26 October 2011, the Agency submitted its opinion on the Ombudsman's proposal. The opinion was forwarded to the complainant with a request to submit observations. On 2 December 2011, the Agency granted the complainant access to the requested documents. On 31 January 2012, the complainant submitted his observations on the Agency's opinion.

The Ombudsman's analysis and conclusions

A. Allegation that the Agency failed properly to deal with the complainant's request for access to documents

Arguments presented to the Ombudsman

13. In support of his allegation, the complainant raised the following arguments:

- the Agency's reply referred to only one report and did not specify which one of the two requested reports it concerned;

- the Agency failed to demonstrate how the disclosure of the two reports would undermine the protection of the purpose of the audits;
- the Agency failed to take into account the restrictions established by the settled case-law, according to which any exception must be interpreted restrictively, and can only be invoked on condition that there is no overriding public interest in disclosure;

- the Agency wrongly invoked the protection of investigations because the investigations in question had already been finalised. In fact, the Agency confirmed that the action plan in question had already been presented and was currently being implemented;

- the Agency wrongly considered it appropriate to wait for an action plan based on an audit report to be finalised before making the latter public. If this approach were followed, it would mean that no audit reports could be made public because recommendations made in such reports are rarely carried out (and thus not finalised);

- the publication of audit reports (or action plans) could constitute a strong incentive for implementing their recommendations, instead of undermining their protection.

14. In its opinion, the Agency explained that internal audit reports are documents prepared by its Internal Audit Sector and the Internal Audit Service of the European Commission in the context of audit exercises. It stated that the requested documents are two internal audit reports of audits carried out in 2008. Although both documents were similar to each other with regard to the nature of information contained therein, and to the function they served during audit exercises, they are different in terms of their authorship. On the basis of the above, and the fact that this was the first time that access to such documents had been requested from the Agency, the Agency considered it appropriate to deal with the access request in a coordinated and consistent way. It therefore consulted the Internal Audit Service of the Commission. During this consultation, the Agency received guidance from the Internal Audit Service of the Commission regarding the definition of the "closure of the audit". According to this guidance, an audit should not be considered complete at the time the audit report is finalised, but rather "when the auditor has checked that the recommendations are implemented (that is, in relation with the purpose of the internal audit)."

15. As regards the substance of the case, the Agency explained that the aim of the Commission's Internal Audit Service is to improve the operations of an institution. Audits achieve this aim through a systematic and disciplined approach. They evaluate the effectiveness of risk management, control and governance processes and make recommendations for improving these processes [5]. In line with the above, the Commission's Internal Audit Service conducts inquiries and surveys into current practices, and then produces internal audit reports. In such reports, the findings and observations of the auditors are accompanied by an Action Plan and/or a document entitled Opportunities for Improvement. However, the adoption of the final internal audit report does not conclude the audit exercise itself. The report is only an instrument which serves to achieve the aim of the audit. Formally, an audit is considered as closed only after the adoption of another document, the so-called internal audit closure form. Therefore, the internal audit report is a "living document" when the implementation of the audit plan is still ongoing. This fact has to be taken into account when deciding whether the purpose of the audit could be undermined.
by the release of preparatory acts addressed to the institution’s management with an eye to improving audited operational activities.

16. In the present case, the Agency considered that granting access to the requested audit reports would not be appropriate because the audit exercise was still ongoing. It pointed out that both reports contain Opportunities for Improvement which the Agency was currently implementing. It also pointed out that the auditors were monitoring their implementation. Consequently, the Agency concluded that the complainant’s arguments that (i) the Agency was wrong to wait for the finalisation of an action plan, and (ii) waiting would lead to an unacceptable situation in which no audit reports could be made public were without merit. The Agency referred to the complainant’s arguments which were based on the case-law of the Union courts [6]. This case-law states that a refusal to grant access to the Internal Audit Service of the Commission documents cannot be justified when “the follow-up action to be taken has not been decided”. According to the complainant, this would make “access to [the Internal Audit Service of the Commission] documents dependent on an uncertain, future and possibly distant event.” The Agency argued that this is clearly not true in the case at hand because the follow-up actions arising from the internal audit reports had not only been decided, but were also being implemented.

17. The Agency added that it was with a view to promoting greater transparency that its 2008 Annual Report referred to the internal audit reports. It was that publication in the Annual Report which made both the complainant and the public at large aware not only of the existence of these reports but also of the opportunities for improvement that follow the former’s adoption. The Agency’s position is also supported by the practice of the Commission’s Internal Audit Service, which confirmed that, as stated in its letter dated 18 February 2010, its reports are released only “once the audit and the service’s action plans are completed”.

18. In his observations, the complainant stated that he was not satisfied with the Agency’s reply and made the following observations. First, the Agency appears to argue that granting even partial access to an audit report before the signing of the internal audit closure form would undermine the protection of the purpose of the audit. Therefore, the exception in Article 4(2) of Regulation 1049/2011 applies. However, the fact that, in some cases, this exception could apply before the implementation plan is concluded does not mean that it would be systematically applicable in every case. In addition, the Agency has failed to demonstrate how granting access to the two internal reports would in fact undermine the protection of the purpose of the audit.

19. Second, the signing of the internal audit closure form is an uncertain and future event. The fact that, two years after the adoption of the reports, these forms have still not been signed makes one wonder whether the Agency is not intentionally delaying their signing in order to keep the reports in a “provisional” state, thereby undermining its obligation of transparency.

20. Third, the audit report on the assessment for human medicine was drafted by the Commission’s Internal Audit Service. Further to the Agency’s consultation request, the said
Service confirmed on two occasions that it did not have any objections to the disclosure of the report, provided the personal data contained therein are protected. Nevertheless, the Agency claims that its refusal to grant access is justified by the position of the Commission's Internal Audit Service.

21. Fourth, given that the subject matter of the audit report was the application for access to documents under Regulation 1049/2001, the complainant found it particularly strange that access to this audit report was refused.

22. Fifth, contrary to the provisions of Regulation 1049/2001, the Agency failed to verify whether there was an overriding public interest in disclosure. It is in the interest of public health that the Agency's scientific evaluations are carried out rigorously and independently. The complainant also pointed out that the Agency's transparency policy is an essential element in ensuring that it is subject to democratic control. The two reports evaluating the Agency's scientific evaluations and its transparency policy represent an overriding public interest.

23. Finally, the Agency did not, at any stage, envisage the partial disclosure of the reports. In fact, it should not pose any problem for the Agency to disclose only the findings of the report, without the parts relating to the relevant follow-up actions.

24. The complainant concluded his observations by stating that he initially wished to have access to these two reports in order to be able to contribute constructively to the Agency's public consultation on its new policy on transparency. The way the Agency responded to his request for access to documents shows the worrying way in which it is operating.

The Ombudsman's preliminary assessment leading to a friendly solution proposal

25. The Ombudsman first recalled that Article 73(1) of Regulation 726/2004 [7] provides that:


26. Regulation 1049/2001 reflects the intention of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly and as closely as possible to the citizen. To ensure that this goal is attained, it grants the public a right of access to documents held by the institutions in all areas of activity of the European Union. This right is subject to certain exceptions that are based on the need to protect defined objective public and private interests. The right of public access to documents held by the institutions enhances the democratic nature of the EU institutions.

27. According to the settled case-law of the Union courts, the exceptions to public access to
documents must be interpreted and applied strictly so as not to frustrate the application of the general principle that the public should be given the widest possible access to documents held by the institutions [8]. Furthermore, the principle of proportionality requires that exceptions from the general rule that access must be given remain within the limits of what is appropriate and necessary for protecting the defined objective public and private interests which are set out in those exceptions [9].

28. The examination required for processing a request for access to documents must be specific in nature. First, the mere fact that a document concerns an interest protected by an exception is not sufficient to justify the application of that exception [10]. In principle, the application of an exception can be justified only if the institution has previously determined that access to the document would specifically and actually undermine the protected interest. In addition, the risk that the protected interest may be undermined must be reasonably foreseeable and not purely hypothetical [11]. The examination of the above factors must be apparent from the reasoning of the decision [12].

29. If the exception which is considered to apply relates to Article 4(2) and (3) of Regulation 1049/2001, it must also be verified whether there is no overriding public interest justifying disclosure of the document concerned [13]. The examination of whether there is an overriding public interest must also be apparent from the reasoning of the decision [14].

30. Even if it is clear that a request for access refers to documents covered by an exception, a concrete and individual examination of each document is also necessary where such an examination can enable the institution to assess the possibility of granting the applicant partial access under Article 4(6) of Regulation 1049/2001 [15].

31. In the present case, the Agency argued, both in its reply to the confirmatory application, and in its opinion on the present complaint, that the purpose of the audit exercises could be undermined if the reports were made public before the closure of the audit exercise. It pointed out that the audit reports themselves had been finalised at the time the complainant made his request. However, the reports identified certain opportunities for improvement, which were still being carried out at that time. The Agency therefore considered the audit reports to be 'living documents' and that the audit exercise was still ongoing. This approach was, according to the Agency, supported by the Commission's Internal Audit Service which informed the Agency that the "Commission services release reports [of the Commission's Internal Audit Service] once the audit and the service's action plan are completed."

32. The Union courts [16] have held that the exemption provided for in Article 4(2), third indent, of Regulation 1049/2001 had to be interpreted in such a way so that it applies only if disclosure of the documents in question may endanger the completion of the activities covered by Article 4(2), third indent of Regulation 1049/2001, namely, that they endanger the completion of inspections, investigations or audits. The Union courts have, however, stated that the various acts of investigation, inspection or audit may only remain covered by the exception based on the protection of inspections, investigations and audits as long as the investigations, inspections or audits continue [17]. In Case T-471/08, the institution holding the documents requested (the European Parliament), argued that, at the time the request for
access was made, it still had to implement the audit's findings. This argument was explicitly rejected by the Union courts. The General Court stated the following:

"45 Nevertheless, to allow that the various documents relating to inspections, investigations or audits are covered by the exception referred to in the third indent of Article 4(2) of Regulation 1049/2001 until the follow-up action to be taken has been decided would make access to those documents dependent on an uncertain, future and possibly distant event, depending on the speed and diligence of the various authorities. Such a solution would be contrary to the objective of guaranteeing public access to documents relating to any irregularities in the management of financial interests, with the aim of giving citizens the opportunity to monitor more effectively the lawfulness of the exercise of public powers (Franchet and Byk v Commission, cited in paragraph 9 above, paragraphs 111 and 112).

46 It was therefore appropriate to ascertain whether, at the time of the adoption of the decisions contested in that case, inspections and investigations were still in progress which could have been jeopardised by the disclosure of the requested documents, and whether those activities were carried out within a reasonable period (Franchet and Byk v Commission, cited in paragraph 9 above, paragraph 113).

47 It is clear from those statements that the exception to the right of access laid down in the third indent of Article 4(2) of Regulation 1049/2001 may be declared to be applicable to an audit report the disclosure of which could jeopardise inspections or investigations which were being conducted, for a reasonable period, on the basis of its content.

48 In the present case, in the first paragraph on page 3 of the contested decision, the Parliament's refusal to grant access to Report No 06/02 on the basis of the third indent of Article 4(2) of Regulation No 1049/2001 is founded, by reference to the judgment in Franchet and Byk v Commission, cited in paragraph 9 above, on the submission that 'Parliament's administration should be given a reasonable period of time to allow for consideration and immediate implementation of [the] proposals [contained in Report No 06/02], as requested by Article 86 of the Financial Regulation'.

49 According to the same paragraph of the contested decision, '[to] grant access to this document at this stage, even partially, could compromise this effective use of the Report and thus the “purpose of the audit”'. In the first and second paragraphs on page 4 of the contested decision, the Parliament concludes, this time in affirmative terms, that to grant such access, even partially, at that stage 'would compromise the effective use of [the] contents [of Report No 06/02]' or ‘undermine the purpose of the audit’.

50 It is clear from those statements that the Parliament submits, on the basis of the judgment in Franchet and Byk v Commission, cited in paragraph 9 above, that disclosure of Report No 06/02 at the date of the contested decision would have been too early to allow it successfully to complete, even before any reforms of the regulatory and/or legislative framework for the parliamentary assistance allowance, the immediate actions recommended in that report.
51 However, the contested decision makes no mention of any specific inspection or investigation or of any other administrative checks which were ongoing at the time of that decision and which might have constituted the implementation of the immediate actions recommended in Report No 06/02.

52 The contested decision, in the part concerned with the rejection of the request for access to Report No 06/02, thus merely makes reference in an abstract manner to the need to allow the administration a reasonable period of time for the immediate implementation of the proposals contained in that report and merely mentions various initiatives undertaken for the purpose of a regulatory and/or legislative reform of the rules governing parliamentary assistance.

53 In that connection, the reference to those various initiatives undertaken with a view to reform of parliamentary assistance relate, not so much to the exception laid down in the third indent of Article 4(2) of Regulation No 1049/2001 concerning the protection of the purpose of inspections, investigations and audits, as to the exception laid down in Article 4(3) thereof relating to the protection of the institution's decision-making process. It is, moreover, in that sense that, at the top of page 4 of the contested decision, the Parliament states that ‘disclosure of ... Report [No 06/02] would, at present, seriously undermine the decision-making process of the European Parliament'.

54 The only reference, in the contested decision, to a specific investigation appears in the part of that decision rejecting the request for access to certain redacted passages of audit reports other than Report No 06/02, on the ground that access to those passages would lead to disclosure of an individual case of suspected fraud under investigation by the European Anti-Fraud Office (OLAF). In reply to a question from the Court at the hearing, the Parliament indicated, however, that Report No 06/02 did not, for its part, contain any nominative information allowing individual cases to be identified.

55 At the hearing, the Parliament maintained that inspection and investigation procedures and other administrative checks on the basis of Report No 06/02 were ongoing at the date of the contested decision. However, as stated in paragraph 51 above, that decision does not mention any procedure of that kind. Consequently, that decision, which does not mention those alleged procedures, provides even less justification as to why the period for their completion had, in August 2008, to be regarded as reasonable or how, in particular, their successful completion would have suffered through disclosure of Report No 06/02.

56 At the hearing, the Parliament also argued that disclosure of Report No 06/02 would have been contrary to the nature of that document. It is, the Parliament submitted, an internal document, drawn up in the context of the Financial Regulation, and not a document which was intended to be made public, such as the report of the Court of Auditors of the European Union on the implementation of the budget, which is published annually in the Official Journal of the European Union. According to the Parliament, disclosure of that type of internal document risks leading internal auditors of the institutions to impose limits on their comments, with the consequence that the internal audits would be less effective in improving the functioning of the institutions concerned.
57 It must be noted, at the outset, that that reasoning does not appear in the contested decision. It is true that, on pages 2 and 3 of that decision, the Parliament cited the first subparagraph of Article 86(1) of the Financial Regulation, which mentions that the internal auditor advises the institution on dealing with risks. However, it did not extrapolate from those quotations, one of which, moreover, appears in a part of the contested decision other than that which examines the request for access to Report No 06/02, any argument comparable to that which it put forward for the first time at the hearing. Moreover, the fact that, in the present case, the Parliament has authorised access, at least in part, to 15 of the 16 internal audit reports mentioned in the request for access indicates that it is not so much the nature of those audit reports as internal documents that determined the decision to grant or refuse access by the Parliament as much as the specific subject and content of those reports.

58 In view of the foregoing, it must be held that, in the contested decision, the Parliament failed to establish to the requisite legal standard that access to Report No 06/02 would have undermined the purpose of the audit. Consequently, without there being any need to examine the question as to whether there is an overriding public interest in disclosure, it must be held that the contested decision, in so far as it refused access to Report No 06/02 on the basis of the third indent of Article 4(2) of Regulation No 1049/2001, is unfounded." [18] (emphasis added)

33. The Ombudsman noted that the complainant requested access to the reports of audits that were carried out in 2008. The Agency did not argue that these reports had not been finalised, but only that the implementation of their findings was still ongoing at the time the request was made.

34. In sum, if no specific inspection, investigation or audit, or any other administrative checks were ongoing at the time the decision refusing access was made, Article 4(2) third indent of Regulation 1049/2001 cannot apply.

35. In this context, the Ombudsman considered it important to clarify the concepts of inspection, investigation or audit. All such activities concern gathering information and analysing it, in particular for the purpose of identifying errors or omissions by the entity subjected to the inspection, investigation or audit. Such inspections, investigations or audits end with the adoption of the relevant conclusions or reports, which give an account of the results of the inspections, investigations or audits.

36. The implementation of the conclusions of the reports clearly forms part of a different and separate procedure. This separate procedure aims at achieving the goals set out in the audit report. However, the successful realisation of these goals obviously cannot change the findings of the audit report. The Ombudsman therefore did not share the Agency’s view that the (internal) audit reports are subject to Article 4(2) third indent of Regulation 1049/2001 until the implementation of the Action Plans and/or Opportunities for Improvement has been carried out. Such an interpretation could lead to the dubious situation where no audit report could be made public until all recommendations (action plans, Opportunities for
Improvement) contained therein have been implemented. The public at large would not even know what recommendations were actually put forward. Such an eventuality would make it impossible to learn about revealed shortcomings or their proposed improvement. Such a broad approach clearly cannot be reconciled with the principle of a strict interpretation and application of the exceptions laid down in Article 4 of Regulation 1049/2001.

37. In light of the above, the Ombudsman found that the Agency did not demonstrate that the invocation of the exemption provided for in Article 4(2), third indent, of Regulation 1049/2001 was justified.

38. It could not, of course, be excluded that such follow up actions may be relevant as regards the exception laid down in Article 4(3) of Regulation 1049/2001 relating to the protection of the institution’s decision-making process. However, this exception was not invoked by the Agency. The Ombudsman noted that, whereas Article 4(2) of Regulation 1049/2001 applies if the protected interest, in this case the purpose of the audit, would be undermined by the disclosure of the document, Article 4(3) of Regulation 1049/2001 only applies if the interest in question, namely, the institution’s decision-making process, would be seriously undermined.

39. Furthermore, the Ombudsman recalled that Regulation 1049/2001 requires the institution holding the requested document to balance the public interest in disclosure with the interests protected in order to determine if there is an overriding public interest in disclosure. To determine whether such an interest exists, the institution holding the document must carry out a balancing exercise, taking into account, on the one hand, the harm caused by disclosure and, on the other hand, the public interest in disclosure. The Ombudsman also noted that the institution concerned should, in addition to taking into account any arguments put forward by the applicant as regards the existence of an overriding public interest in disclosure, carry out ex officio its own examination as regards whether there is such an overriding public interest.

40. In the present case, the Agency did not appear to have carried out a balancing exercise. This was all the more disappointing, given the Agency’s exceptionally important role in the monitoring of medicines, a field which is, in principle, of paramount public interest. The Ombudsman underlined that citizens are directly affected by the Agency’s decisions relating to the authorisation and supervision of medicinal products, including its continuous monitoring and assessment of the safety of medicines that are already on the market. It is therefore of vital importance that the Agency’s work be as open as possible. [19]

41. The need to carry out an evaluation to determine if there was an overriding public interest in disclosure was all the more important given that the aim of the internal audit exercises was to carry out an evaluation of the Agency’s operations and to improve them. According to the Agency, the audit identified area(s) for improvement and proposed relevant action. The Ombudsman considered that, if audits reveal areas of improvement in such important fields as access to information and assessment for human medicines, not only the public in general has an interest in learning about these proposed improvement, but the Agency itself can benefit from showing the public that it has identified these areas and is
willing to take the necessary actions for their improvement. The Ombudsman found that the Agency also failed to carry out an evaluation to determine if there was an overriding public interest in disclosure of the reports.

42. Finally, the Ombudsman noted that Article 4(6) of Regulation 1049/2001 allows for the possibility of partial access to a document. When an institution receives a request for public access to a document which contains sensitive information, such as personal data, it should examine whether access to a redacted version of the document is possible. If that is the case, the institution should proceed to the redaction of that document for the purposes of providing partial access to it.

43. The Ombudsman noted that, in the present case, the Agency did not consider the possibility of granting the complainant partial access to the reports in question.

44. Accordingly, the Ombudsman arrived at the preliminary finding that the Agency failed properly to deal with the complainant's request for access to documents. He therefore made a proposal that the Agency could reconsider its refusal to grant access to the two internal audit reports.

Arguments presented to the Ombudsman after his friendly solution proposal

45. In its opinion on the Ombudsman's friendly solution proposal, the Agency agreed to reconsider its decision on the request for access to the two internal audit reports in light of the Ombudsman's reasoning and the case-law cited in his proposal. It stated that it welcomed the complainant's statement that he wishes to have a "constructive role" in contributing to the transparency and openness of the Agency's activities. It agreed to make public the two internal audit reports requested, with certain redactions, as well as an accompanying note on the status (on 30 November 2011) of the implementation of the recommendations made in the audit reports.

46. In his observations on the Agency's opinion on the friendly solution proposal, the complainant acknowledged receipt of the two internal audit reports, as well as of the promised note on the status of implementation of the recommendations made in the audit reports.

The Ombudsman's assessment after his friendly solution proposal

47. The Ombudsman finds that the Agency has accepted his friendly solution proposal and that, as a result, it has provided the complainant with the requested documents and with a further explanatory note. He also notes that the complainant has confirmed receipt of the documents concerned and that therefore a friendly solution has been reached.
48. The Ombudsman again underlines the notable progress that the Agency has made in rendering its work more transparent, by dealing appropriately with requests for access to documents [20]. Such significant improvements serve to ensure that citizens will have greater trust in the Agency, thus increasing its legitimacy and effectiveness in carrying out its important public health tasks.

B. Conclusion

On the basis of his inquiry into this complaint, the Ombudsman closes it with the following conclusion:

A friendly solution has been achieved between the complainant and the Agency.

The complainant and the Director of the Agency will be informed of this decision.

P. Nikiforos Diamandouros

Done in Strasbourg on 14 March 2012


[2] Article 4(4) of Regulation 1049/2001 provides: "As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed."

[3] Article 4(2) of Regulation 1049/2001 provides: "The institutions shall refuse access to a document where disclosure would undermine the protection of ... the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure."

[4] The complainant’s letter was registered as a new complaint under reference 2914/2009/DK.

[5] This is provided for in the "Mission Charter of the Internal Audit Service of the Commission of the EC in relation to traditional agencies and institution bodies." A copy of the Mission Charter was attached to the Agency’s opinion.


[14] The Ombudsman has taken the view that the analysis of an overriding public interest must not only take into account the arguments put forward by the applicant. It must take into account all relevant arguments, including those which, ex officio , the institution concerned believes to exist (see draft recommendation of the European Ombudsman concerning his inquiry into complaint 3106/2007/TS against the European Medicines Agency at paragraph 26, available on the Ombudsman's website).


